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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JUAN FUENTES, Defendant and Appellant.	D074195 (Super. Ct. No. FSB1105456)

APPEAL from a judgment of the Superior Court of San Bernardino County, J. David Mazurek, Judge. Affirmed and remanded with directions.

Allison H. Ting, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Daniel J. Hilton, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Juan Fuentes shot Roy Craddock in the head six times at close range. The crime was captured on surveillance video. Fuentes was convicted of first degree murder with personal use of a handgun, which he personally discharged, causing death. (Pen. Code, §§ 187, subd. (a), 12022.53, subds. (b), (c) & (d).)[1] The jury found true that Fuentes had one prior serious or violent felony conviction. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) The trial court sentenced Fuentes to an indeterminate term of 80 years to life.

Fuentes raises issues of sufficiency of the evidence, admission of gang evidence, failure to bifurcate the trial on his prior conviction, instructional error on intimidating a witness, prosecutorial error at closing argument, a five-year prior serious felony conviction enhancement, and cumulative error. We remand with directions and otherwise affirm the judgment.

BACKGROUND

Twenty-five-year-old Craddock was shot six times in the head, from no more than nine inches away, late in the evening of November 3, 2011. He died within seconds or minutes. His body was found the next day, in the rain, in front of an elementary school in Muscoy, San Bernardino County. A cellphone was under his body. His keys and a grocery bag holding clothing were nearby. His backpack containing two cell phones, clothing and toiletry items was found in a nearby dumpster. Craddock had $60 in his pocket. There were no cartridge shells near his body.

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1 Further statutory references are to the Penal Code unless otherwise specified.

Craddock had called his sister-in-law several times on November 3, asking for a ride home. She finally agreed at 11:18 p.m. to pick him up half a block from the elementary school because it was cold and rainy. Craddock hung up the phone on his sister-in-law, which was unusual. When she arrived to pick him up, he was not there and she could not find him. She and her brother searched for Craddock in the area for about two hours without success.

Craddock was murdered within two minutes of calling his sister-in-law. The autopsy showed that Craddock had been shot once under his right eye and five more times on the right side of his head. All the wounds were from no more than nine inches away, and three of the wounds into the right side of Craddock's head were from an even closer range.

A surveillance video from the elementary school near where Craddock's body was found showed Fuentes and Raymond G.[2] were in front of the elementary school after 11:10 p.m. They were closer to the school than to the sidewalk and mostly out of view of the camera. Craddock, wearing a backpack and carrying a white grocery bag, walked past the school at 11:19:36 p.m. He passed Fuentes and Raymond, apparently not noticing them. Fuentes walked toward the sidewalk and apparently called Craddock over.[3] Craddock turned around and walked back, meeting up with Fuentes at 11:19:54

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2 Raymond G. was 16 years old at the time of the murder. Although referred to throughout trial as Fuentes's nephew, he was not. He was a nephew of the girlfriend of Fuentes's brother.

p.m. Fuentes extended his arm and shot Craddock at 11:19:59 p.m. Craddock immediately fell to the ground. Fuentes and Raymond took his backpack and ran off, returning once briefly.

Sergeant David Johnson and Detective Scott Cannon advised Fuentes of his *Miranda*[4] rights and interviewed him a month after the crime. A portion of the audio/video tape of the interview was played for the jury.[5] The interview determined Fuentes and Craddock were both members of the West Side Verdugo gang, but from different cliques. Fuentes belonged to the Little Counts clique and Craddock belonged to the Mount Vernon clique. Fuentes told the officers that he had dropped out of the gang to take care of his son. He believed West Side Verdugo members were out to punish him for leaving the gang.

During the interview, Fuentes gave numerous stories to the officer, starting with claiming to know nothing about the murder except what he saw on the news. Fuentes said he met Craddock once and got along well with him. Later, Fuentes said that a few

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3 In denying a motion for new trial, the trial court described the video by saying, "it's very clear to the Court that Mr. Craddock was passing by when something caught his attention and he came back."

4 *Miranda v. Arizona* (1966) 384 U.S. 436.

5 During in limine motions, the trial court found Fuentes tried to invoke his right to counsel and to remain silent about half way through the interview, but the officers kept questioning him. The court excluded the portion of the interview following Fuentes's attempt to invoke his right.

weeks earlier, he had been jumped by someone. He said Craddock did not participate in the beating but was in the crowd that stood in the back watching.

After denying being present at the murder site, Fuentes admitted he was at the school but denied that he saw Craddock. Then he said that on the night of the murder, Craddock and others had been chasing him and Raymond with the intent to rob him. The men called out, "Verdugo, Mt. Vernon and 7th." Fuentes and Raymond ran away and stopped at the school after evading the group. Craddock found them at the school and "pushed up" on them. Craddock said to Fuentes, "hey whatz's [*sic*] up homie? . . . I know who the fuck you are, you're dead, homie." Fuentes stated he pushed Craddock away and ran off with Raymond.

Fuentes next said Craddock pulled out a gun and shot five times at him. Fuentes said he pushed Craddock and punched him repeatedly until Craddock fell to the ground. He also stated that he wrestled the gun from Craddock and threw it away as he and Raymond were running from the scene. He later said he shot Craddock once after taking his gun, then upped the number of shots to three. Fuentes eventually admitted that he "probably" shot more than three times. He said that he took Craddock's backpack because he thought Craddock might have a gun and he did not want Craddock to get up and chase after him with a gun. He said he threw the backpack into a trashcan.

San Bernardino Police Officer Johnathan Plummer and San Bernardino Sheriff's Deputy James Diaz testified at trial. Both had extensive personal experience with West Side Verdugo and other gangs. West Side Verdugo was a large gang that included smaller cliques, including the Little Counts clique and the Mount Vernon clique. Deputy

Diaz concluded that Fuentes was a member of the Little Counts clique of West Side Verdugo, and Fuentes had admitted the same to Officer Plummer. Fuentes told Officer Plummer that he did not want to belong to the gang anymore and wanted instead to take care of his son. Gang members frequently told police officers they did not want to belong to the gang anymore but did not follow through. Getting out of a gang is a long and difficult process that is generally not successful unless the person moves away from all gangs and cuts contact with them. An entrenched gang member who leaves a gang could be severely assaulted or killed by other gang members.

The officers both testified that fear and intimidation, called respect by gang members, is the most important value for gang members. Gang members admire people who commit violent acts and will not allow anyone to disrespect them. Witnesses often will not testify against gang members who stand trial due to fear of retaliation. West Side Verdugo members commit crimes about once a month. They intimidate witnesses, especially gang members who are in custody.

Deputy Diaz testified about Fuentes's prior conviction in December 2010. Fuentes and two others had shown gang signs and made threats toward a victim. The victim was afraid of violence from Fuentes because he lived in the same area. Fuentes pleaded guilty to making criminal threats and admitted being a member of West Side Verdugo as part of that plea. (§§ 422, 186.22, subd. (b).)

DISCUSSION

1. *Substantial Evidence Supports the Verdict*

Fuentes contends there is insufficient evidence to support his conviction for first degree murder. We disagree.

On review for insufficiency of the evidence we apply a well settled standard. "[W]e must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime . . . beyond a reasonable doubt. We review the entire record in the light most favorable to the judgment below to determine whether it discloses sufficient evidence—that is, evidence that is reasonable, credible, and of solid value—supporting the decision, and not whether the evidence proves guilt beyond a reasonable doubt. We neither reweigh the evidence nor reevaluate the credibility of witnesses. We presume in support of the judgment the existence of every fact the jury reasonably could deduce from the evidence. If the circumstances reasonably justify the findings made by the trier of fact, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*People v. Jennings* (2010) 50 Cal.4th 616, 638–639, citations and internal quotation marks omitted; *Jackson v. Virginia* (1979) 443 U.S. 307, 318–319.)

To prove first degree murder, the People had the burden of proving beyond a reasonable doubt either that Fuentes acted with premeditation and deliberation or that he committed the murder in the course of a robbery. (See § 189 [first degree murder includes killings that are willful, deliberate, and premeditated and those that are

committed in the perpetration of robbery].) For felony murder, the defendant must be the actual killer, have an intent to kill, or be a major participant and have formed the intent to steal either before or during the fatal act. (§ 189, subd. (e); *People v. Valdez* (2004) 32 Cal.4th 73, 105.) It can reasonably be inferred that a person who takes something of value after killing another committed the murder for the purpose of stealing. (*People v. Johnson* (2015) 60 Cal.4th 966, 988 (*Johnson*); *People v. Marshall* (1997) 15 Cal.4th 1, 35.) The evidence supports both theories.

a. *Fuentes Acted with Premeditation and Deliberation*

A "willful, deliberate, and premeditated killing" is murder in the first degree. (§ 189.) Willful means intentional. (§ 7, subd. (1).[6]) "A willful murder is an intentional murder, and malice is express when there is an intent to unlawfully kill a human being." (*People v. Moon* (2005) 37 Cal.4th 1, 29 (*Moon*).) First and second degree murders are both willful, i.e. intentional. First degree murder requires, in addition, premeditation and deliberation. "In the context of first degree murder, premeditation means considered beforehand and deliberation means a careful weighing of considerations in forming a course of action. . . . The process of premeditation and deliberation does not require any extended period of time. [T]he true test of premeditation is the extent of the reflection, not the length of time. Thoughts may follow each other with great rapidity and cold,

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6 "The word 'willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage." (§ 7, subd. (1).)

calculated judgment may be arrived at quickly . . . ." (*People v. Salazar* (2016) 63 Cal.4th 214, 245 (*Salazar*), citations and internal quotation marks omitted.) Planning, motive, prior relationship with victim, and manner of killing can all show premeditation and deliberation, "but these factors are not exclusive nor are they invariably determinative." (*People v. Marks* (2003) 31 Cal.4th 197, 230; *People v. Anderson* (1968) 70 Cal.2d 15, 26–27).

Craddock was on his way home on a cold and rainy night. The surveillance video shows that he walked right past Fuentes without stopping. The jury could reasonably infer that Fuentes called out to Craddock, causing Craddock to turn around and walk back to Fuentes. Within seconds, Fuentes shot Craddock in the face from a distance of a few inches. There was no visible provocation. In ruling on Fuentes's motion for new trial, the trial court stated, "[T]here's nothing on the video that demonstrated a scuffle or that the victim fired any shots or anything that would remotely call into question self-defense or didn't even look like there was any sort of argument." Fuentes's description of verbal threats made by Craddock was not credible because he changed his story several times during his police interview. The video contradicted Fuentes's story that he knocked down Craddock and took his gun after Craddock aimed a gun at him.

A conviction of first degree murder due to gang retaliation was affirmed in *People v. Gonzalez and Solis* (2011) 52 Cal.4th 254, 294–295 (*Gonzalez and Solis*), on facts similar to those in this case. The defendants in *Gonzalez and Solis* drove past two men who appeared to belong to a rival gang that had killed a member of the defendants' gang. The defendants turned their car around, drove back to the victims and shot them. (*Id.* at

pp. 293–295.) The Supreme Court held the jury could have drawn a reasonable inference that the defendants formed the intent to commit premeditated and deliberate murder when they turned around to go back and shoot the victims. (*Id.* at p. 295.) Similarly, the jury here could reasonably infer from the surveillance video that Fuentes formed a premeditated and deliberate intent to kill when he saw Craddock pass by, called him back, and immediately shot him point-blank. The *Gonzalez and Solis* opinion notes that a cold and calculated judgment can be made with premeditation and deliberation within a short time, and that killings based on gang rivalries and culture often show premeditation and deliberation. (*Id*. at pp. 294–295; see also *People v. Rand* (1995) 37 Cal.App.4th 999, 1001–1002 [killing of perceived members of rival gang "evidences the most cold-blooded, most calculated, most culpable, kind of premeditation and deliberation"].)

The jury could reasonably conclude that the violent retaliation endemic to gang culture supplied Fuentes's motive to kill Craddock. Both defense counsel and the prosecutor suggested possible motives that were embedded in gang culture. Fuentes contended in closing argument that Craddock threatened to kill him because he had dropped out of the gang and that he shot Craddock in self-defense. The prosecutor argued that Fuentes was retaliating against Craddock because Craddock had watched the beating of Fuentes, and that Fuentes killed Craddock either because Craddock failed to help a fellow gang member, or to restore his respect in front of a younger gang member — Raymond — by killing a man who had witnessed Fuentes's vulnerability. (See *Gonzalez and Solis*, *supra*, 52 Cal.4th at pp. 294–295 [gang rivalry was motive for

killing]; *Salazar*, *supra*, 63 Cal.4th at p. 245 [shooting someone perceived to be rival gang member shows motive].)

Tellingly, once Craddock had fallen from the first shot, Fuentes pulled the trigger on his revolver five more times, each time shooting into Craddock's head at close range. This is strong evidence of a cold, calculated, premeditated and deliberate murder. (*Salazar*, *supra*, 63 Cal.4th at p. 245 [nine shots at close range supports conclusion that killing was deliberate]; *People v. Lee* (2011) 51 Cal.4th 620, 637 (*Lee*) [shooting victim in forehead, with six more shots to head after victim fell, indicates premeditation and deliberation]; *People v. Koontz* (2002) 27 Cal.4th 1041, 1082 (*Koontz*) [firing at vital area at close range supported finding of premeditation and deliberation].) The manner of killing, by itself, provides overwhelming support for the jury's finding of premeditation and deliberation that was necessary for first degree murder.

By conflating premeditation with willfulness, Fuentes argues that first and second degree express malice murder both require premeditation as well as an intent to kill. That is wrong. Premeditation is different from willfulness or intent to kill. Although express malice for both first and second degree murder requires an intent to kill (*People v. Beltran* (2013) 56 Cal.4th 935, 941–942 (*Beltran*)), an intent to kill is not equivalent to premeditation (*Moon*, *supra*, 37 Cal.4th at p. 29). As noted, premeditation is more than an intent to kill. The premeditation and deliberation required for first degree murder include both consideration of the killing beforehand and a careful weighing of the considerations in forming a course of action. (*Salazar*, *supra*, 63 Cal.4th at p. 245.) In contrast, second degree murder requires an intent to kill but does not require such

consideration and weighing. It occurs when a person intends to kill as the "result of mere unconsidered or rash impulse hastily executed." (*People v. Thomas* (1945) 25 Cal.2d 880, 900–901.) In other words, second degree murder occurs when the defendant intentionally kills, but his judgment has been obscured by strong emotion due to provocation, even though a person of ordinary disposition would not respond to the provocation with obscured judgment.[7] (See *People v. Jones* (2014) 223 Cal.App.4th 995, 1000.)

In the present case, there was no evidence that Fuentes acted on rash impulse or with obscured judgment. He never described such a state of mind when interviewed by the officers. No provocation was visible on the surveillance video. Fuentes claimed self-defense, which would have resulted in either acquittal, if it were reasonable, or voluntary manslaughter if it were unreasonable. (*People v. Blacksher* (2011) 52 Cal.4th 769, 833 [voluntary manslaughter for actual but unreasonable belief in need for self-defense].) As we have noted, the evidence strongly supported a finding that Fuentes was a deliberate aggressor who initiated the confrontation with Craddock. (See *Salazar*, *supra*, 63 Cal.4th at p. 244.)

Fuentes relies heavily on *People v. Boatman* (2013) 221 Cal.App.4th 1253, in which the court found insufficient evidence of first degree murder and reduced the

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[7] If the judgment and reasoning of a person of ordinary disposition would be obscured as a result of the provocation, any killing resulting from that obscured judgment would be voluntary manslaughter if the defendant's judgment were so actually obscured. (*Beltran*, *supra*, 56 Cal.4th at p. 942.)

conviction to second degree murder. Significantly, in that case the defendant was "horrified and distraught about what he had done," tried to resuscitate the victim, told his brother to call the police, and could be heard crying in the background of the 911 call, all inconsistent with a premeditated and deliberate plan to kill. (*Id*. at p. 1267.) The *Boatman* opinion highlights the cold and calculated judgment of Fuentes and does not support any argument that Fuentes acted on an unconsidered and rash impulse.

b. *Felony Murder*

Substantial evidence also supports Fuentes's first degree murder conviction on a felony murder theory. Fuentes was the actual killer, and his taking of Craddock's backpack supports a reasonable inference that Fuentes killed Craddock for the purpose of stealing his backpack. (*Johnson*, *supra*, 60 Cal.4th at p. 988 [reasonable inference of felony murder when perpetrator takes something after murder].) The fact that Fuentes later threw the backpack away does not vitiate the robbery. It reflects circumstances that occurred only after Fuentes formed the intent of, and carried out, stealing the backpack.

Substantial evidence supports Fuentes's first degree murder conviction on both theories of felony murder and premeditated and deliberate murder.

2. *Admission of Gang Evidence*

Fuentes contends the court committed prejudicial abuse of discretion in admitting excessive and inflammatory evidence about gang culture. We disagree. It was error to admit small parts of the expert's testimony, but that evidence was not harmful.

Fuentes was originally charged with a substantive gang offense (§ 186.22, subd. (a)) but that count was dismissed before trial. There was no substantive gang offense or

gang allegation at trial. Fuentes moved before trial to exclude gang evidence, contending it was more prejudicial than probative. The prosecutor showed the court a transcript from Raymond stating that just before the shooting, Fuentes and Craddock "were gangbanging on each other [and] there was mention of which hood they were from." In other words, the shooting resulted from a rivalry between the two cliques. The trial court admitted the gang expert evidence because it was relevant to intent and motive, concluding the gang expert would assist the jury in understanding those issues. Raymond did not testify at trial, but the gang evidence was relevant to intent and motive.

The trial court instructed the jury that it could consider the gang evidence for the limited purposes of deciding whether Fuentes acted with the intent to kill; whether he had a motive; whether he actually believed in the need to defend himself; or whether he acted in the heat of passion. The jury was told it could not conclude from the gang evidence that Fuentes had a disposition to commit crimes. Both Fuentes and the People used the gang evidence in closing argument to support their respective positions on Fuentes's motive, intent to kill, necessity of defense, and state of mind.

Evidence of gang membership and activity is admissible when it is logically relevant to some material issue in the case other than criminal propensity, such as motive or intent, even when neither a gang offense nor gang enhancement has been charged. (*People v. Pettie* (2017) 16 Cal.App.5th 23, 44 (*Pettie*); *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 (*Hernandez*).) "Gang evidence is relevant and admissible when the very reason for the underlying crime, that is the motive, is gang related. [Citation.]" (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167.) "Evidence of the defendant's

gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.]" (*Hernandez,* at p. 1049.)

When gang-related evidence is relevant, the trial court must carefully scrutinize it before admission because of its potentially inflammatory impact on the jury. (*Pettie*, *supra,* 16 Cal.App.5th at p. 44; *People v. Carter* (2003) 30 Cal.4th 1166, 1194.) In addition to being relevant, the trial court must ensure that the evidence is not introduced to show criminal propensity or bad character, is not more prejudicial than probative, and is not cumulative. (*People v. Avitia* (2005) 127 Cal.App.4th 185, 192; Evid. Code, § 352.) Prejudice under Evidence Code section 352 refers to "evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, prejudicial is not synonymous with damaging." (*People v. Karis* (1988) 46 Cal.3d 612, 638, internal quotation marks and citations omitted.) The trial court has the duty to weigh the probative value of gang evidence against its prejudicial effect. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223–225 (*Albarran*).) We review the trial court's ruling for abuse of discretion. (*Id*. at p. 225; see also *People v. Clark* (2016) 63 Cal.4th 522, 597 (*Clark*) [evidentiary rulings reviewed for abuse of discretion].)

Gang evidence was relevant in this case to motive, intent, self-defense and Fuentes's state of mind, and was outside the knowledge of lay people. Fuentes's potential motives for murdering Craddock were that Craddock threatened to kill him for having

left the gang, or Craddock watched a group that beat Fuentes, either failing to help or being a witness to Fuentes's weakness. The attorneys used these motives during closing argument. Defense counsel argued that Fuentes acted in self-defense believing Craddock had been sent to kill him for leaving the gang. The prosecutor argued that Craddock watched Fuentes get beaten up. As a gang member, Fuentes had to retaliate to establish that he would not allow others to disrespect him, especially because he was in the presence of a younger gang member.

Inasmuch as gang expert testimony was relevant to Fuentes's motive, intent and state of mind, it was admissible. (*Pettie*, *supra*, 16 Cal.App.5th at p. 44.) However, we conclude the trial court allowed the expert to go too far by permitting a reference to the Mexican Mafia, descriptions of crimes commonly committed by West Side Verdugo members and discussions of gang establishment and control of territory. Deputy Diaz said 13 was one of the numeric signs of the West Street Verdugo Gang, 13 identifies the Mexican Mafia, and most Southern California Hispanic gangs were affiliated with the larger Mexican Mafia group. This connection was not relevant and highly prejudicial. The officer also identified crimes committed by West Side Verdugo members: homicide, robberies, drug dealing, extortion, pimping, and prostitution. He talked about gangs' control of territory and intimidation of nongang members within that territory. This evidence was prejudicial and not relevant. Because there was no gang offense or allegation charged, it was not necessary to prove that West Side Verdugo was a criminal street gang within the meaning of section 186.22, subdivision (f), which requires proof

that the group commits crimes as one of its primary activities. It was not disputed that Fuentes, Raymond and Craddock were all gang members.

We conclude, however, that any error in the admission of testimony regarding the Mexican Mafia, crimes committed by West Side Verdugo, and gangs' control of territory was harmless because the references were brief and not mentioned during argument, and further, the trial court instructed the jury on the limited use of the gang evidence. We presume that the jurors understood and followed the trial court's instructions in the absence of any evidence to the contrary. (*Pettie, supra,* 16 Cal.App.5th at p. 45.) There is no evidence suggesting the jurors were unable or unwilling to follow the court's instruction.

Fuentes received a fair trial. (*People v. Partida* (2005) 37 Cal.4th 428; *Estelle v. McGuire* (1991) 502 U.S. 62.) Evidence of his guilt was overwhelming. There is no reasonable likelihood that Fuentes would have received a more favorable result if the brief references to irrelevant gang material had been excluded in this case. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

3. *Bifurcation of Prior Conviction*

Fuentes contends the court prejudicially erred in refusing to bifurcate trial of the allegation that he had a prior conviction for making a gang-related criminal threat. We find no error.

The People alleged that Fuentes had one prior serious or violent conviction for making a criminal threat for the benefit of, at the direction of, or in association

with a criminal street gang. Fuentes moved to bifurcate the proof of this conviction from the trial on the charges. The trial court said that it would normally bifurcate the prior conviction, but the prior conviction included Fuentes's admission of a gang enhancement. The court reasoned that Fuentes's admission of acting for the benefit of, at the direction of, or in association with a criminal gang in the past was the best indicator of his current status as a gang member, which was relevant to his motive and intent in this case. The court denied the motion to bifurcate on the ground there was no undue prejudice to Fuentes because the essential information of gang violence and Fuentes' participation would be admitted anyway.

Fuentes's prior crime occurred just a year before this murder. Deputy Diaz, the gang expert, testified about Fuentes's criminal threat in November 2010, as described above. Fuentes admitted gang membership when he pleaded guilty in December 2010. The trial court instructed the jury that if it found Fuentes guilty of murder or voluntary manslaughter, it must then decide if he had been previously convicted of making criminal threats with a gang enhancement. It could consider the prior conviction for the limited purpose of determining if Fuentes had been previously convicted of a crime, and not as proof of the current charges. The oral instruction differed from the written instruction because the court added orally that the jury could consider the prior conviction in determining if Fuentes was a gang

member or involved in gang activity. The jury had the obligation of determining the truth of the prior conviction allegation beyond a reasonable doubt. The prosecutor referred to the prior conviction twice during closing argument, explaining to the jury its obligation to decide if the allegation of the prior conviction was true and describing it as one bit of evidence that Fuentes was a gang member, along with his admission to the officers and the tattoo on his back. We find no error or prejudice in his comments.

The decision whether to bifurcate part of a case is entrusted to the discretion of the trial court. (*Hernandez, supra*, 33 Cal.4th at p. 1048; *People v. Calderon* (1994) 9 Cal.4th 69, 79 (*Calderon*).) A unitary trial of the current charges and the truth of a prior conviction does not offend the federal Constitution. (*Spencer v. Texas* (1967) 385 U.S. 554, 567–569.) Our state courts have recognized, however, that proof of a prior conviction might be unduly prejudicial during a trial on current charges. (*Calderon*, at p. 75.) Bifurcation is therefore required when admission of the prior conviction during the guilt trial would "pose a substantial risk of undue prejudice to the defendant." (*Id*. at p. 78; *People v. Burch* (2007) 148 Cal.App.4th 862, 866–867 (*Burch*).) It is not required when the prior conviction is an element of the charged offense, when it is known that the defendant will testify at trial, or when the prior conviction is relevant to prove matters such as the defendant's identity, intent, motive or plan. (*Calderon*, at p. 78.) Trial courts have

the discretion to weigh the possible undue prejudice to the defense in ruling on a motion to bifurcate. (*Id*. at p. 79.)

Factors to consider when evaluating undue prejudice to the defendant include "the degree to which the prior offense is similar to the charged offense, how recently the prior conviction occurred, and the relative seriousness or inflammatory nature of the prior conviction as compared with the charged offense . . . ." (*Burch*, *supra*, 148 Cal.App.4th at pp. 866–867, citations and internal quotation marks omitted; *Calderon*, *supra*, 9 Cal.4th at p. 79.) The potential for prejudice is reduced when, as here, evidence of the uncharged offense is admissible for other purposes. (*Burch*, at p. 867; *Calderon*, at p. 79.) We conclude the trial court did not abuse its discretion. (*Hernandez*, *supra*, 33 Cal.4th at p. 1050; *Calderon*, at p. 79.)

Further, we conclude that to the extent error occurred, it was harmless, given Fuentes's acknowledgement that he shot Craddock and the video showing he shot Craddock within seconds. There was no reasonable likelihood that Fuentes would have received a more favorable verdict even if evidence of his prior conviction had been excluded. (*Watson*, *supra*, 46 Cal.2d at p. 836.) The failure to bifurcate did not result in gross unfairness amounting to a denial of due process. (*Burch*, *supra*, 148 Cal.App.4th at p. 867; *United States v. Lane* (1986) 474 U.S. 438, 449

[constitutional rights violated only if misjoinder had substantial and injurious effect or influence on the jury's verdict].) There was no prejudice to Fuentes.

4. *CALCRIM No. 371*

Raymond was called to the stand twice but refused to testify, despite being told by the court that he had no lawful right to refuse. The trial court instructed the jury that it could consider Raymond's refusal as showing Fuentes's consciousness of his own guilt if Fuentes had discouraged Raymond from testifying. The court instructed the jury with CALCRIM No. 371, as follows: "If the defendant tried to hide evidence or discourage someone from testifying against him, that conduct may show that he was aware of his guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself." Fuentes contends that it was error to give this instruction because there was insufficient evidence that he was the one who dissuaded Raymond from testifying. We agree with Fuentes, but find the error was harmless.

The instruction on consciousness of guilt due to dissuading a witness, like all other instructions, may be given even if there is no conclusive evidence that the defendant dissuaded a witness. (*People v. Alexander* (2010) 49 Cal.4th 846, 921; *People v. Kerley* (2018) 23 Cal.App.5th 513, 565–566 (*Kerley*).) But there must be some evidence in the record that, if believed by the jury, would support an inference referenced in an instruction. (*Clark, supra*, 63 Cal.4th at p. 605; *People v. Morgain* (2009) 177 Cal.App.4th 454, 468.) Whether the evidence is sufficient is a mixed question of law and

fact for the trial court in the first instance, and for the appellate court on review. (*Kerley*, at p. 565.)

We agree with Fuentes that this record contains insufficient evidence to draw a reasonable inference that Fuentes was the one who persuaded Raymond not to testify. The gang experts testified that gangs intimidate witnesses into not testifying against gang members, and that this pressure is especially strong for gang members who are in custody. The trial took place six years after the murder and there is no evidence of contact between Fuentes and Raymond in the years between 2011 and 2017. By 2017, Raymond was associated or affiliated with the West Side Verdugo gang. He had West Side gang tattoos and was classified as a gang member in the jail system. He was in custody in Oklahoma when called to testify. In custody, he had nowhere to avoid other gang members who would likely retaliate against him for breaking the gang code by testifying. The People rely on the fact that Raymond refused to testify when faced with Fuentes in court. That alone is insufficient to support an inference that Fuentes persuaded him not to testify, especially with the six-year gap between the crime and the trial and no evidence of contact within that time. A gap of six years does not ordinarily lead to a heightened sense of personal loyalty.

This error was not prejudicial to Fuentes, however. The instruction told the jury that an adverse inference of consciousness of guilt was permissible only if it first concluded that Fuentes tried to hide evidence or discourage someone from testifying against him. The jury was further instructed to decide the meaning and importance of that conduct, if true, and cautioned that "evidence of such an attempt cannot prove guilt

by itself." The jury was also instructed that some instructions might not apply, depending upon its determination of the facts, and it should follow the instructions that applied to the facts as it found them. If evidence did not support the consciousness of guilt instruction, "we presume that the jury concluded that the instructions did not apply to him and it should not infer a consciousness of his guilt." (*People v. Nunez and Satele* (2013) 57 Cal.4th 1, 49; *People v. Powell* (2018) 6 Cal.5th 136, 168 [any error in giving precursor to CALCRIM No. 371 "was harmless because the inference it permitted was superfluous"]; *Kerley*, *supra*, 23 Cal.App.5th at p. 566 [same].) Moreover, Fuentes admitted that he shot Craddock multiple times and the murder was captured on video. His consciousness of guilt was not in question given his statements to the police. (*Powell*, at p. 168 [any error harmless due to statements the defendant made to the police]; *Kerley*, at pp. 565–567.) The error in giving CALCRIM No. 371 was harmless.

5. *Prosecutorial Error*[8]

Fuentes contends that the prosecutor committed two errors during closing argument: misstating the law on first and second degree murder and mentioning street terrorism. We conclude Fuentes forfeited these issues by failing to object in the trial court, and any error was harmless.

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8 Fuentes contends that the prosecutor committed misconduct, but prosecutorial misconduct " 'is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.' [Citation.]" (*People v. Centeno* (2014) 60 Cal.4th 659, 666–667.)

"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury. When a claim of misconduct is based on the prosecutor's comments before the jury, . . . the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Adams* (2014) 60 Cal.4th 541, 568–569, citations and internal quotation marks omitted.)

a. *Forfeiture by Failing to Object*

We conclude Fuentes has forfeited his claim of prosecutorial error. " 'As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.' " (*People v. Rangel* (2016) 62 Cal.4th 1192, 1219 (*Rangel*).) By failing to object to the prosecutor's closing argument remarks and request a curative admonition in the trial court, a defendant forfeits his claim of prosecutorial error on appeal. (*People v. Gamache* (2010) 48 Cal.4th 347, 371.)

Fuentes did not object or ask for an admonition when the prosecutor made the two comments in question. Fuentes argues that an objection will be excused if it would have been futile but gives no reason why an objection would have been futile in this case. He has forfeited this claim on appeal but urges us to consider the constitutional question to

forestall a claim of ineffective assistance of error. Notwithstanding our finding of forfeiture, we have reviewed the prosecutor's argument and find no prejudicial error.

b. *Misstatement of Murder Law*

"It is misconduct for a prosecutor to misstate the law during argument." (*People v. Otero* (2012) 210 Cal.App.4th 865, 870.) Such errors are evaluated in light of the entire record, including the prosecutor's closing argument as a whole, the court's instructions, and the evidence of the defendant's culpability. " 'When attacking the prosecutor's remarks to the jury, the defendant must show' that in the context of the whole argument and the instructions there was ' "a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner." ' [Citation.]" (*Rangel*, *supra*, 62 Cal.4th at p. 1219.)

At one point during closing argument, when distinguishing second degree murder from first degree murder, the prosecutor said that second degree murder has the "[s]ame elements for the most part as that first degree murder. We've got malice aforethought. We've got the act causing death of a human being. We've got the without lawful justification. *But second degree murder is a situation where we don't have that willfulness or the deliberation or that premeditation*. And in our case it's very clear that we have all of those three things. We got [*sic*] willfulness, deliberation, and premeditation . . . . We're talking about a first degree murder rather than a second degree murder."

Fuentes contends that it was error to say there was no premeditation in second degree murder, confusing premeditation with intent to kill, as in his sufficiency of

evidence argument, *ante*. As explained above, this argument fails because premeditation is not an element of second degree murder. Express malice second degree murder does, however, include a willful intent to kill. The prosecutor thus erred in stating that second degree murder was not willful. This error, however, was harmless.

Critically, the trial court provided the correct law on first and second degree murder and told the jury to follow the instructions given by the court, not the law explained by the attorneys when it differed from the law contained in the instructions. " 'When argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former, for "[w]e presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade." [Citations.]' " (*People v. Centeno*, *supra*, 60 Cal.4th at p. 676.) Even if the complained-of statements lowered the prosecution's burden of proof in any way, such error was harmless beyond a reasonable doubt because we presume that the jury followed the court's correct statement of the law. (*Ibid*.) There is no evidence that rebuts the presumption. Further, as discussed above, there was no evidence of an express malice second degree murder. Defense counsel argued that Fuentes did not commit either first or second degree murder, but either committed voluntary manslaughter or acted in self-defense. Fuentes has not shown that in the context of all the evidence, argument and instructions there was any reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. (*Rangel*, *supra*, 62 Cal.4th at p. 1219.)

c. *Street Terrorism*

Fuentes also complains that he was prejudiced by the prosecutor's reference to street terrorism during closing argument. We conclude he was not.

The prosecutor did not refer to Fuentes's conviction under section 422 as making terrorist threats. It was during testimony that the threats were referred to as terrorist threats by Deputy Diaz. These statements were not attributable to the prosecutor. The prosecutor's references to terrorism were all in connection with the gang enhancement, not the threats, and were not erroneous.

The prosecutor referred to the prior conviction twice during closing argument. The prosecutor said that Fuentes had "a prior street terrorism conviction." She also said that he had "been convicted of a violation of Penal Code sections 422, which is criminal threats. 186.22(b)(1)(b) [gang enhancement], which is street terrorism . . . ." She referred to his plea agreement as having "criminal threats and street terrorism listed." The prosecutor's references to street terrorism were all in connection with the gang enhancement, which was enacted as part of the California Street Terrorism Enforcement and Prevention Act. (§ 186.20.) It was accurate to refer to the gang enhancement as street terrorism.

Moreover, the prosecutor's references to street terrorism were brief. There was no error in these brief references, and even if erroneous, the references were not prejudicial. In the context of the whole trial and argument, there was no "reasonable

likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner." (*Rangel, supra*, 62 Cal.4th at p. 1219, internal quotation marks omitted.) Fuentes's trial was not fundamentally unfair. (*People v. Adams, supra*, 60 Cal.4th at p. 568.) The prosecutor's comments that Fuentes challenges on appeal were not prejudicial.

6. *Cumulative Error*

Fuentes contends that even if any one issue does not require reversal, the cumulative effect of the errors was prejudicial under the federal constitution and/or state law. We disagree. We have found error or assumed its existence in some instances, but those errors, cumulatively, did not deprive Fuentes of a fair trial and did not result in a miscarriage of justice. (*Estelle v. McGuire, supra,* 502 U.S. at p. 70 [trial that is fundamentally unfair violates due process]; *Watson, supra,* 46 Cal.2d at p. 836 [case can be reversed for state error only if errors resulted in miscarriage of justice].) Fuentes admitted shooting Craddock and the video showed he did so within seconds of contacting him. The cumulative effect of any errors in this case was not prejudicial under either the federal or the state standard.

7. *Prior Conviction*

The trial court imposed a five-year enhancement for a prior serious felony conviction under section 667, subdivision (a). The first amended information, however, did not allege the section 667, subdivision (a) enhancement. It alleged only the prior strike conviction enhancement, under sections 667, subdivisions (b)-(i) and 1170.12,

subdivisions (a)-(d). Fuentes contends that he had no notice of having a prior serious felony conviction within the meaning of section 667, subdivision (a), and thus that the trial court erred in imposing a five-year sentence enhancement under that subdivision.

We agree. "[W]hen, as here, the People allege a prior serious felony conviction, and when they cite the three strikes law but do *not* cite the prior serious felony conviction statute, we can only conclude that they have made 'a discretionary charging decision.' " (*People v. Nguyen* (2017) 18 Cal.App.5th 260, 267.) Fuentes did not object to imposition of this term, but the error was not forfeited because imposition of the uncharged enhancement was unauthorized. (*Id.* at p. 272.)

We direct the trial court to vacate the five-year enhancement upon remand.

On another matter, the trial court ordered that Fuentes pay the mandatory court facilities assessment of $30 (Gov. Code, § 70373, subd. (a)(1)) and the $40 court security fee (§ 1465.8, subd. (a)(1)), but they do not appear on the abstract of judgment. We direct the trial court to correct the abstract of judgment by adding these fees.

DISPOSITION

The case is remanded with directions to vacate the five-year prior serious felony conviction enhancement, to amend the abstract of judgment by deleting this enhancement, and by adding the fees imposed under Government Code section 70373, subdivision (a)(1)), and Penal Code section 1465.8, subdivision (a)(1)). We further direct the trial court to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

BENKE, Acting P. J.

WE CONCUR:

HALLER, J.

AARON, J.